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IN THE

Supreme Court of the United States

October Term, 1969

No. 1450

A/S J. LUDWIG MOWINCKELS REDERI,
Petitioner,

against

DOW CHEMICAL COMPANY and DOW CHEMICAL INTERNATIONAL, S.A.,
Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Statement

The Respondents, Dow Chemical Company and Dow Chemical International S.A., respectfully pray that this Court shall deny the petition heretofore filed herein to review a judgment of the New York Court of Appeals which has refused to apply a state limitation statute to enjoin arbitration of a maritime controversy governed by the Federal Arbitration Act.

Outline of Previous Proceedings

On December 1, 1964, the petitioner and the respondents entered into a contract for the carriage of certain chemicals by sea, over a period of three years, from Free-

port, Texas, to The Netherlands on three vessels, namely, the STRINDA, BORGA, and GRENA, owned by the petitioner. The contract contained a clause for arbitration in New York of all disputes between the parties.

During the course of the contract, claims arose as a result of contamination of cargo on each of the three ships. Payment of the claims was eventully refused by the shipowner and its insurers and the respondents demanded arbitration pursuant to the terms of the contract.

The petitioner thereupon instituted a proceeding in the Supreme Court for New York County to stay the arbitration, basing its application on the contention that the respondent's claims were barred by reason of a section in the New York Civil Procedure Law, which provides that a party may assert a time limitation as a bar to an arbitration if the claim also would have been barred had the limitation been asserted as a defense in a court of the state.

The New York Supreme Court denied the petitioner's motion and refused to stay arbitration. That ruling was upheld on an appeal to the Appellate Division of the Supreme Court and subsequently, in the New York Court of Appeals, the highest court of the state.

The last-named court decided that since the underlying controversy was solely federal in character, it was governed exclusively by federal substantive law, under which a time limitation is no bar to commencement of a Federal Arbitration Act proceeding (Petition, Appendix C). The court followed the rule of the decision of this court in *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S. 395 (1967) and held that it was binding on state courts as well as federal courts. The New York Court of Appeals pointed out that it was particularly important to apply the federal law as otherwise, it would permit forum shopping, it would undermine the need for nationwide uniformity in the interpretation and application of arbitration clauses in foreign and interstate transactions and would permit individuals to circumvent the national law relating to arbitration agreements as called for by the Federal Arbitration Act.

The Question Presented

The question here involved really is whether a party to a maritime contract, solely federal in character, may be permitted to frustrate an arbitration under the Federal Arbitration Act by commencing a state court proceeding to enjoin enforcement of the arbitration provisions in the contract on grounds which are specifically denied to it under the federal court decisions.

Reasons for Denying the Writ

The charter agreement between the parties is clearly one which is of maritime nature concerned with foreign commerce and the controversy here is specifically covered by the provisions of the Federal Aribtration Act, (9 U. S. C. §§ 1-14). Under the decisions of the federal courts construing the Arbitration Act, it has been consistently held that once a valid arbitration agreement has been established, all other matters are reserved for the decision of the arbitrators and are not for the court to determine.

The federal law has exclusive application here. Consequently, under the settled law as determined by the federal courts, the time bar which the petitioner wishes to impose may not be used as a basis to stay the arbitration.

That was the decision of the New York Court of Appeals, following the rules laid down in decisions of the federal courts, particularly the decision of this court in *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S. 395 (Supra) and that of the Second Circuit Court of Appeals in *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.*, 271 F 2d 402 (1959). In both decisions, the courts held that a plea of fraud in the inducement of an interstate contract could not be used to bar an arbitration under the Federal Arbitration Act, but rather, constituted matter subsequently to be passed upon by the arbitrators. The *Robert Lawrence* decision further held that the federal court rule

should govern within state and federal courts as national substantive law, even in the face of a contrary state rule. This court seems to have specifically noted its agreement with that proposition in the *Prima Paint* case (388 U. S. 395, 400).

The decision in *Matter of Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109 (1924), cited at page 8 of the Petition, is not inconsistent with the New York Court of Appeals decision or the decision of this court in the *Prima Paint* case. The *Red Cross Line* case held that where Congress had not previously acted in the field, the courts of New York could order parties to proceed with arbitration under a maritime contract. That decision, of course, was handed down before passage of the Federal Arbitration Act and once that statute was enacted, it became the supreme law with reference to the arbitration of maritime controversies.

The *Red Cross Line* decision may not be invoked as authority for permitting a change in the Federal Arbitration Act as it has been interpreted in the federal courts and at the outside, can only be regarded as authority upholding the jurisdiction of state courts to require arbitration of a maritime agreement. Certainly, that case does not constitute authority whereby a state limitation statute may be used to frustrate performance of a maritime arbitration agreement.

It is further submitted that even if a state court ordered performance of such arbitration agreement, pursuant to the *Red Cross Line* decision, the federal rules of law in maritime matters would apply. See *United N. Y. & N. J. Sandy Hook Pilots Ass'n.* v. *Halecki*, 358 U. S. 653 (1959); *Lindgren* v. *U. S.*, 281 U. S. 38 (1930). A state may not adopt in a maritime cause, remedies which make changes in the "substantive maritime law". *Madruga* v. *Superior Court*, 346 U. S. 556 (1954).

By the same token, the "saving to suitors" clause in the Judiciary Code does not save to suitors the right to

make use of state court remedies which would bar the uniform application of the Federal Arbitration Act to maritime controversies. As was said in the *Lindgren case*, (281 U. S. 38, 46)

> " . . . and now that Congress has acted, the laws of the States, insofar as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is".

To apply any other rule and to permit a state court to stay an arbitration valid under the Federal Arbitration Act, as the Petitioner seeks to do here, would destroy the very uniformity in the maritime law which the act was intended to preserve. It would create the absurd situation in New York, for instance, where a federal court on one side of the street would follow one established rule of law while a state court across the street, acting on the identical factual situation, could reach a directly opposite result.

Conclusion

Summarizing then, this application pertains to the interpretation of the Federal Arbitration Act dealing with an admiralty matter. There are no differences between the federal courts of the various circuits on the interpretation of the statute and the federal law is well-settled that once having established a valid arbitration provision, all other issues are for the arbitrators. The New York Court of Appeals has held that the controversy here is covered exclusively by the federal law and it has followed the rules laid down in federal court decisions. Consequently, there appears to be no reason for a further review of the New York decision and the petition should be denied.

Dated: New York, New York,
May 12, 1970

Respectfully submitted,

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